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Supreme Court, U.S.
FILED

No. 96 629 OCT 1 8 1996

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

ARTHUR CALDERON, WARDEN, *Petitioner*,

v.

STEVEN H. CASWELL, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
MARGARET VENTURI
Supervising Deputy Attorney General
ARNOLD O. OVEROYE
Senior Assistant Attorney General
Counsel of Record
1300 I St., Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5282
Counsel for Petitioner

101 pp

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APPENDIX A

FILED
AUG 14 1996
CATHY CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STEVEN H. CASWELL,	NO. 93-16146
Petitioner-Appellant,	D.C. No. CV 91-1079-WBS
v.	**MEMORANDUM***
ART CALDERON, Warden, CALIFORNIA REHABILITATION CENTER,	
Respondent-Appellee.	

Appeal from the United States District Court
for the Eastern District of California
William B. Shubb, District Judge, Presiding

Argued and Submitted May 12, 1994
San Francisco, California

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.
Before: GOODWIN, POOLE, REINHARDT Circuit Judges.

Petitioner Steven H. Caswell appeals the district court's denial of his habeas petition under 28 U.S.C. § 2254. The majority affirmed the denial on June 14, 1995 in a memorandum disposition, with one judge dissenting. Petitioner filed a timely petition for rehearing. We subsequently entered an order deferring action on the petition pending the disposition of Roy v. Gomez, 81 F.3d 863 (9th Cir. 1996) (en banc), which considered an issue very similar to that raised here. In light of our decision in Roy, we grant the petition for rehearing, vacate our previous disposition and reverse the district court's denial of Caswell's habeas petition.

Caswell was convicted on four counts each of robbery, kidnapping, assault with a deadly weapon, and attempted murder. The trial court erred in instructing the jury on aiding and abetting because he failed to inform the jury that the specific intent to aid the principal's crimes is an element of the offense. See People v. Beeman, 674 P.2d 1318, 1325 (Cal. 1984); Roy, 81 F.3d at 866; see also In re Winship, 397 U.S. 358, 364

(1970) (due process requires proof beyond a reasonable doubt of all elements of the offense).

The issue here is whether the error was harmless. We conclude that it was not. The petitioner did not testify, and there is some conflicting evidence in the record as to his intent. We are precluded from engaging in our own evaluation of the weight of the evidence, Martinez v. Borg, 937 F.2d 422, 425 (9th Cir. 1991),and cannot conclude that the jury necessarily found the omitted element of the offense. Roy, 81 F.3d at 868. Because we cannot evaluate the effect of the omission on the jury's verdict, we are necessarily "in grave doubt as to the harmlessness of the error." Id. (citing O'Neal v. McAninch, 115 S.Ct. at 992, 994-95 (1995)), and must grant the relief requested.

Conclusion

For the reasons stated above, we GRANT the petition for rehearing, VACATE our previous disposition, and REVERSE and REMAND for further proceedings consistent with this disposition.

FILED
AUG 14 1996
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

Caswell v. Calderon, 93-16146

Goodwin, Circuit Judge, dissenting:

I continue to believe the court made a serious departure from both established criminal law and common sense when it constitutionalized one of California's curious instructional rules in order to set aside convictions of obviously guilty felons who had received fair trials and had been correctly convicted. See Roy v. Gomez, 81 F.3d 863 (9th Cir. 1996) (en banc).

In this current example of a misapplied rule, the majority concludes that the newly revealed error was not harmless. Reasonable minds can differ on that essentially subjective question. Whether reasonable or not, my mind is satisfied that the error was harmless by any standard of evaluation. This kind of nit-picking of state convictions is another self-inflicted wound which the vulnerable relations between the state and federal courts

do not need, and which serves no useful purpose. I respectfully dissent.

APPENDIX B

FILED
JUN 14 1995
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STEVEN H. CASWELL	)	
	)	
Petitioner-Appellant,	)	No. 93-16146
	)	
v.	)	D.C. No. CV-01079-WBS
	)	
ART CALDERON, Warden, CALIFORNIA REHABILITATION CENTER,	)	MEMORANDUM*
	)	
Respondent-Appellee.	)	
	)	

Appeal from the United States District Court
for the Eastern District of California
William B. Shubb, District Judge, Presiding

Argued and Submitted May 12, 1994
San Francisco, California

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Before: GOODWIN, POOLE, and REINHARDT, Circuit Judges.

Steven H. Caswell, a California state prisoner, appeals the district court's denial of his 28 U.S.C. § 2254 habeas petition. Caswell was convicted of four counts each of robbery, kidnapping, assault with a deadly weapon and attempted murder. Caswell argues, and the State concedes, that the trial court's aiding and abetting instruction was erroneous because the jury was not properly instructed that an aider and abettor must have specific intent to aid the principal's crimes. See People v. Beeman, 674 P.2d 1318, 1325 (Cal. 1984) (aiding and abetting instruction to the jury must include specific intent to aid the principal's crime); see also Martinez v. Borg, 937 F.2d 422, 423 (9th Cir. 1991) (instruction is constitutionally deficient if the jury is deprived of its duty "to find each element of the crime beyond a reasonable doubt"). Therefore, we need only determine whether the denial of Caswell's

due process rights was harmless error. We review de novo, Christian v. Rhode, 41 F.3d 461, 464 (9th Cir. 1994), and we affirm.[1]

To obtain relief on collateral review, a habeas petitioner must show that the error "'had substantial and injurious effect or influence in determining the jury's verdict.'" Brecht v. Abrahamson, 113 S. Ct. 1710, 1722 (1993) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)). "[I]f the harmlessness of the error is in grave doubt, relief must be granted." O'Neal v. McAninch, 115 S. Ct. 992, 996 (1995).

Here, the State introduced the following evidence: Caswell was present, had knowledge of codefendant David Englund's criminal intent, and actively assisted Englund in the crimes by helping pull

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1. Relying on Teague v. Lane, 489 U.S. 288, 310 (1989) (holding that generally new constitutional rules of criminal procedure should not be applied retroactively to cases on collateral review), the State argues that the Beeman error constitutes a new rule which should not be retroactively applied to Caswell. We reject this argument. Beeman merely clarified existing California law, rather than stating a new rule. See id., 674 P.2d at 1323, 1325.

the four victims from a vehicle, instructing them to follow Englund's instructions because "he (Englund) had a hole in his leg," demanding the victims' money, disrobing the victims and tying up three victims with a rope, watching as Englund struck one victim and pushed him over a cliff, attempting to push the remaining victims over a cliff, telling Englund to shoot the remaining victims, and watching as Englund shot the remaining victims.[2]

Based upon the overwhelming evidence, no rational jury could have found the elements of the crimes without also finding that Caswell had the intent of committing, encouraging, or facilitating the crimes. Therefore, the failure to instruct on the need for

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2. We note that Caswell earlier favored not shooting the victims, while Englund favored such action. This fact, however, is insignificant in light of Caswell's later unequivocal statement to shoot the victims.

specific intent did not have a substantial or injurious impact on the jury's verdict.[3] See Brecht, 113 S. Ct. at 1722; see, e.g., Watts v. Bonneville, 879 F.2d 685, 688-89 (9th Cir. 1989) (Beeman error harmless where defendant had knowledge of two cohorts rape of victim and immediately raped her when they finished); Willard v. People of State of Cal., 812 F.2d 461, 464 (9th Cir. 1987) (Beeman error harmless where jury's rejection of duress and mistaken identity defenses entailed that the jury also found specific intent to aid and abet); cf. Martinez, 937 F.2d at 425 (Beeman error not harmless where jury could have reached a verdict ofaiding and abetting without finding specific intent based upon the perpetrator's sudden, point-

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3. Caswell appears to argue that the erroneous jury instruction prejudiced him because he was unable to present either a diminished capacity defense based upon his consumption of alcohol and drugs, or a duress defense. We reject this argument on both grounds. Although Caswell failed to raise a diminished capacity defense, the jury was instructed to consider his mental state and rejected such a defense. Additionally, the evidence adduced at trial did not necessarily support a duress theory.

blank range shooting of officers). Accordingly, the error was harmless.

AFFIRMED.

APPENDIX C

FILED
MARCH 31, 1993
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT CALIFORNIA
BY_____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

STEVEN H. CASWELL

Petitioner,

v.

ARTHUR CALDERON et al.,

Respondents.

_____/

No.
CIV. S-91-1079
WBS PAN P

ORDER

Petitioner, a state prisoner proceeding pro se, has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local General Order No. 262.

On March 12, 1992, the magistrate judge filed findings and recommendations herein which were

served on all parties and which contained notice to all parties that any objections to the findings and recommendations were to be filed within fifteen days. Neither party has filed objections to the findings and recommendations.

The court has reviewed the file and finds the findings and recommendations to be supported by the record and by the magistrate judge's analysis. Accordingly, IT IS HEREBY ORDERED that:

1. The Findings and Recommendations filed March 12, 1993, are adopted in full; and

2. Petitioner's motion for summary judgment on the jury instruction claim is denied, respondents' cross motion is granted; the claim concerning the trial court's failure properly to instruct the jury is dismissed.

DATED: 3/30/93

/S/
UNITED STATES
DISTRICT JUDGE

APPENDIX D

FILED
APRIL 8, 1993
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY_____
Deputy Clerk

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

----ooOoo----

STEVEN H. CASWELL

Petitioner,

v.

ARTHUR CALDERON et al.,

Respondents.

No. CIV. S-91-1079 WBS\PAN P

ORDER

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At the time of signing its Order on March 30, 1993, the court had not seen petitioner's objections, filed March 29, 1993. The court has reviewed the file de novo, including the opposition to the magistrate judge's findings and recommendations, and reaffirms its original decision. The court finds the findings and recommendations to be supported by the

record and by the magistrate judge's analysis. Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed March 12, 1993, are adopted in full; and

2. Petitioner's motion for summary judgment on the jury instruction claim is denied, respondents' cross motion is granted; the claim concerning the trial court's failure properly to instruct the jury is dismissed.

DATED: April 7, 1993

/S/
UNITED STATES
DISTRICT JUDGE

APPENDIX E

FILED
MAR 12 1993

Clerk, U.S. District Court
Eastern District of California
By _____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

STEVEN H. CASWELL,

Petitioner, No. CIV S-91-1079 WBS PAN

vs.

ARTHUR CALDERON, et al.,

FINDINGS AND RECOMMENDATIONS

Respondents.

_____/

Petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 presents two grounds for relief: (1) that an erroneous jury instruction deprived him of due process; and (2) that he was denied due process by the ex post fact application of parole release rules more severe than those in effect at the time

of the offense. The first claim is the subject of the parties' cross motions for summary judgment.[1]

Petitioner was convicted in 1976 of four counts of kidnapping, four counts of robbery, four counts of assault with a deadly weapon, and four counts of attempted murder and sentenced to life imprisonment. Petitioner argues that one of the theories under which he was prosecuted, that he aided and abetted his codefendant in the commission of the crimes, contains a specific intent element and that the erroneous jury instruction relieved the state from its burden of proving this element.

Respondent's answer to this claim precipitated the instant summary judgment motion. Respondents argue that the California Supreme Court ruling, that the jury instruction at issue was erroneous,

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1. Petitioner moved for summary judgment. Respondent opposed, but in the opposition stated that summary judgment should be granted in its favor. Petitioner replied to the opposition, stating that both parties agreed that this claim was ripe for summary judgment, and fully opposing respondent's position. There are clearly no disputes of material fact.

stated a "new rule of constitutional law" not applicable to cases, like petitioner's, that were not pending on appeal at the time the new rule was announced. See Teague v. Lane, 489 U.S. 288 (1989).

Petitioner correctly asserts that the Teague retroactivity issue is a "red herring." Beeman does not purport to announce a new federal constitutional rule of criminal procedure, the first requirement for invoking Teague analysis, but rather held that the jury instruction at issue improperly stated California criminal law.[2] Teague analysis is therefore inapposite to this case. The real issue presented by petitioner's claim is whether the erroneous jury instruction deprived petitioner of any federal constitutional right. 28 U.S.C. 4(a).

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2. Even if the California Supreme Court had undertaken this task, it's[sic] holding would not have been binding upon this or any other federal court and Teague analysis would still not apply. See Wright v. West, 112 S.Ct. 2482, 2488 (plurality) (state court determination of federal law not binding on federal courts); 2494-98 (O'Conner, Blackmun & Stevens, JJ, concurring in the judgment) ("federal courts, even on habeas, have an independent obligation to say what the law is"; state courts' determinations of issues of federal law not binding on federal courts).

Due Process protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073 (1970). Failure to properly instruct a jury regarding an element[3] of a charged crime is a constitutional error that deprives the defendant of due process unless the error is harmless. Hennessy v. Goldsmith, 929 F.2d 511, 514 (9th Cir. 1991).

The jury was instructed that:

> All persons concerned in the commission of a crime who either directly and actively commit the act constituting the offense or who with knowledge of the unlawful purpose of the perpetrator of the crime aid and abet in its commission or, whether present or not, who advise and encourage its commission are regarded by the law as principals in the crime thus committed and are equally guilty thereof.
>
> One who aids and abets is not only guilty as a principal of the particular that to his knowledge his confederates are contemplating committing, but he is also liable as a principal for the natural and is

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3. The substantive elements of a criminal offense are defined by state law. See Jackson v. Virginia, 443 U.S. 307, 324 n.16, 99 S.Ct. 2781, 2792 n.16 (1979).

> also liable as a principal for the natural and reasonable or probable consequences of any act that he knowingly aided or encouraged.
>
> A person aids and abets the commission of a crime if, with knowledge of the unlaw purpose of the perpetrator of the crime he aids, promotes, encourages or instigates by act or advice the commission of the crime. RT at 599.

In 1984, the California Supreme Court held that when the defendant's intent is ambiguous, an aiding or abetting conviction requires "proof that an aider and abettor rendered aid with an intent or purpose of either committing, or of encouraging or facilitating commission of, the target offense." People v. Beeman 35 Cal.3d at 551.

In Beeman, the defendant was convicted of aiding and abetting robbery upon the testimony of others that he was extensively involved in planning the crime, drew a floor plan of the scene, and possessed part of the loot. Beeman testified that two days before the robbery, he told the others that he wanted nothing to do with it and that he furnished the floor plan for an innocent purpose. The jury was instructed that a person aids and

abets the commission of a crime if, with knowledge of the unlawful purpose of the perpetrator of the crime, he aid, promotes, encourages or instigates by act or advice the commission of such crime. The California Supreme Court held that an aider and abettor must act with knowledge of the perpetrator's criminal purpose and intent; otherwise conviction is allowed if the defendant, knowing of the perpetrator's unlawful purpose, negligently or accidentally aided the crime.

The United States Court of Appeals for the Ninth Circuit has held that "Beeman" error is constitutional error when it precludes the jury from finding each element of the crime beyond a reasonable doubt. Martinez v. Borg, 937 F.2d 422, 423 (9th Cir. 1991).[4] In that case, the defendant was convicted of

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4. The error is harmless, however, if no rational jury would have made its finding without also finding that the defendant had the specific intent to aid the crimes committed by the perpetrator. Martinez, 937 F.2d at 423, 424. Yates v. Evatt, 111 S.Ct. 1884 (1991), involved a mandatory rebuttable presumption that shifted the burden to the defendant. Yates requires weighing the probative force of the evidence considered by the jury, in accordance with the instructions, as against the

aiding and abetting the second degree murder of one peace officer and of the attempted murder of another. The evidence was that the murder weapon was usually carried by defendant but that the perpetrator suddenly shot the officers from a car window at point-blank range. The court found that the jury could have found that defendant aided the murder by supplying the murder weapon without necessarily finding that appellant intended the gun to be used to kill the officers. Because the court could not determine that the jury necessarily found specific intent in order to reach its verdict, the instruction omission was not harmless. Id. at 425-26.

Absence of a Beeman instruction, however, does not necessarily remove the issue of intent from the jury's consideration. Only when the defendant's act is not intended, e.g., it is involuntary, or if the defendant,

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probative force of the presumption standing alone. 111 S.Ct. at 1893. Yates has no application to a case involving Beeman error, where an element of the offense is omitted. See Martinez, 937 F.2d at 424. If an instruction omits an element, a court cannot weigh the evidence considered by the jury in accordance with the omitted element.

intending the act, did not know that it would aid the perpetrator's criminal venture, is the Beeman instruction required.[5] That was the case in Martinez but it is by no means this case.

Around 9 p.m. on May 20, 1976, four students from the University of California, Santa Cruz, drove into the Antlers Campground in Shasta County and stopped at campsite 14. Earlier in the day, petitioner and David Englund were dropped off at campsite 16 by a man who picked them up hitchhiking. The students, Eanswythe Leicester, Jim McCabe, Jeremy Grainger, and Laura Goldman, decided to go swimming and walked toward some cliffs to look for a way down to the lake. On the way, they met petitioner who told them it was not a good idea to go the[sic] lake at night, and asked the students for a cigarette. Petitioner and the

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5. See Hart v. Stagner, 935 F.2d at 1012-13 (Beeman error harmless when defense was not lack of intent, but that Hart was not present during crimes); Cf. Martinez, 937 F.2d at 425 n.2; Willard v. California 812 F.2d 461, 464 (9th Cir. 1987) (Beeman error harmless where intent is not a live issue at trial).

students conversed for about 5 minutes, then the students continued toward the lake. There, they arrived at a steep cliff, could not find a way down, and decided to return to their campsite.

On the way back, they crossed into campsite 16, where petitioner and Englund were beside a large campfire. The students asked petitioner and Englund if they knew how the students could get to the lake; petitioner and Englund recommended several places including Whiskeytown. The students decided to drive to another area, packed their car, and began to drive off. Petitioner and Englund flagged them down and one of them asked the students to give them a ride to Whiskeytown. While the students were rearranging their gear to make room for the two men, Englund pulled a gun, stuck it in Jeremy Grainger's face, and ordered the students out of the car. Both defendants roughly pulled the students from the car over to campsite 16, and forced them to sit down. Petitioner told Laura Goldman

that Englund "had a hole in his leg" and that she had better do as Englund said.

Petitioner and Englund demanded money from the students. Grainger and Goldman gave them their money; McCabe said his money was in the car; Leicester denied that she had any money. Petitioner took McCabe over the car while Englund remained with the others, still holding them at gunpoint. McCabe gave his money to petitioner. Petitioner then took McCabe's car keys and drove the car into an open space.

Petitioner and Englund marched the students about 20 or 30 feet into the brush, where petitioner attempted to tie them up, but could not complete the task because he did not have enough rope. Petitioner and Englund then forced the students to walk toward the cliff; when they arrived at the cliff edge, petitioner and Englund forced the students to disrobe and lie down. Leicester was tied by the ankles with Grainger's t-shirt; Grainger and Goldman were tied together with rope, and then Leicester's ankles bound to

them with the same rope. Petitioner indicated that he wanted to take sexual advantage of one of the women, but Englund was in a hurry and the matter was dropped. Petitioner and Englund then debated over whether to shoot the students, Englund favoring this course of action and petitioner against it.

Because they did not have any more rope, petitioner and Englund tied up McCabe with clothing. Englund then struck McCabe with his gun and petitioner pushed McCabe over the cliff. Englund and petitioner then pushed rocks over the cliff until they believed that McCabe was dead. Petitioner then tried to push the others over the cliff but failed because of the manner in which they were bound. The following discussion ensued: Englund: "Let's just gag them." Petitioner: "Shoot them." Englund: "Okay." Englund then shot Goldman in the stomach and Grainger in the chest; he then turned to Leicester, struck her with the gun several times, then shot her twice. Petitioner and Englund then drove away. McCabe, who had managed to survive the

fall, free himself from his bonds, and dodge the rocks rolled down at him, heard the others' cries for help, climbed back up the cliff, and ran for help. Fortuitously, a volunteer rescue team was camping nearby, and rescued the victims. Leicester lost three pints of blood from her wounds; the bullet fired into Grainger was deflected by the sac surrounding Grainger's heart but caused numerous severe internal injuries during its course through his body; the shot to Goldman's abdomen severed an artery, causing massive bleeding; McCabe suffered lacerations requiring stitches.

Petitioner and Englund fled the scene in McCabe's car, were pursued by police, and, after a high-speed chase, abandoned the car and fled on foot; the following morning, an officer called out to the suspects, telling them to come down from the mountain. Petitioner and Englund complied and surrendered without further incident.

Upon this record, it cannot be said that there was any ambiguity concerning whether petitioner

intended to commit, encourage or facilitate the commission of the crimes of robbery, kidnapping and intended murder as to each of the four victims. The trial court's failure to give any different instruction concerning aiding and abetting was not federal constitutional error.

For the foregoing reasons, and good cause appearing therefor, it is RECOMMENDED that petitioner's motion for summary judgment on the jury instruction claim be denied, that respondents' cross motion be granted, and that the claim concerning the trial court's failure to properly instruct the jury be dismissed.

These findings and recommendations are submitted to the Honorable William B. Shubb pursuant to 28 U.S.C. § 636(b)(1)(C). Any party may file written

objections to these findings and recommendations pursuant to L.R. 305(b) within fifteen (15) days after service.

DATED: March 12, 1993.

/s/
UNITED STATES MAGISTRATE JUDGE

PAN:ca

APPENDIX F

FILED
JUN 14 1993

Clerk, U.S. District Court
Eastern District of California
By _____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

STEVEN H. CASWELL,

Petitioner, No. CIV S-91-1079 WBS PAN

vs.

ARTHUR CALDERON,
WARDEN
CALIFORNIA
REHABILITATION
CENTER ORDER

Respondents.
_____/

Petitioner, a state prisoner proceeding pro se, has timely filed a notice of appeal of this court's denial of one of the claims in his application for a writ of habeas corpus. Before petitioner can appeal this

decision, this court must issue a certificate of probable cause.

A certificate of probable cause should be granted only if petitioner seeks to present a "substantial question on appeal." See Gardner v. Pogue, 558 F.2d 548 (9th Cir. 1977). The court finds that petitioner seeks to raise a substantial question on appeal and will, therefore, issue a certificate of probable cause.

In accordance with the above, IT IS HEREBY ORDERED that a certificate of probable cause to appeal is issued in the present action.

DATED: June 11, 1993.

/s/
UNITED STATES MAGISTRATE JUDGE

/eg:th

APPENDIX G

SUPREME COURT
FILED
AUG 15 1990

Robert Wandruff Clerk

Clerk

ORDER DENYING WRIT OF HABEAS CORPUS

No. S015004

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

IN RE STEVEN H. CASWELL

ON

HABEAS CORPUS

Petition for writ of habeas corpus DENIED.

Acting Chief Justice

APPENDIX H

FILED JANUARY 23, 1978
COURT OF APPEAL-3RD DISTRICT
WILFRIED J. KRAMER, Clerk
BY_____, Deputy

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE THIRD APPELLATE DISTRICT

[Shasta]

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. DAVID ALAN ENGLUND and STEVEN HAYNES CASWELL, Defendants and Appellants.	3 Crim 8988 (Sup. Ct. No. 54796)

After a series of events occurring on May 20, 1976, in Shasta County, defendants Englund and Caswell were charged and convicted by a jury verdict of the following offenses:

Count I -- First degree robbery of Eanswythe Leicester during which defendants intentionally inflicted great bodily injury upon the victim. (Pen. Code, §§ 211, 213.) The jury made the additional finding that in the commission of the offense defendants used a firearm. (Pen. Code, § 12022.5.)

Count II -- The kidnapping for purposes of robbery of Eanswythe Leicester. (Pen. Code, § 209.) The information alleged and the jury found that the victim suffered bodily harm while being subjected to the kidnapping and that defendants used a firearm in the commission of the offense. (Pen. Code, §§ 209; 12022.5.)

Count III -- Assault with a deadly weapon or with force likely to produce great bodily injury upon Eanswythe Leicester. (Pen. Code, § 245, subd. (a).) The jury found that defendants used a firearm in the commission of the offense. (Pen. Code, § 12022.5.)

Count IV -- Attempted murder of Eanswythe Leicester. (Pen. Code, §§ 187, 664.) The jury

found that defendants used a firearm in the commission of the offense. (Pen. Code, § 12022.5.)

Counts V-VIII repeat the allegations and verdicts of Counts I through IV with the victim being James McCabe.

Counts IX through XII repeat the allegations and verdicts of Counts I through IV with the victim being Jeremy Grainger.

Counts XIII through XVI repeat the allegations and verdicts of Counts I through IV with the victim being Laura Goldman.

In total each defendant was convicted of 16 offenses together with special findings of the use of a firearm.

The trial court entered judgment on each of the offenses for which the defendants were convicted and on each offense the court entered the finding that defendants used a firearm. Defendants were sentenced to state prison on each of the offenses, the sentences to be concurrent with one another and with any prior

incomplete sentence. The trial court did not make a finding regarding the time defendants were held in jail as a result of the same criminal acts for which they were convicted.

In this appeal defendants urge that (1) the trial court erred in denying defendants' motion for a substitution of attorneys; (2) the trial court erred in denying defendants' motions for a change of venue; (3) defendants cannot be convicted of kidnapping to commit robbery since the asportation of the victims was only incidental to the robbery; (4) defendants' conviction of robbery of Eanswythe Leicester was contrary to the evidence; (5) the trial court failed properly to instruct the jury on assault with a deadly weapon; (6) defendants' sentences cannot be enhanced by a finding of use of a firearm; (7) the trial court erred in imposing multiple punishment; (8) a sentence of life imprisonment without possibility of parole violates the constitution; and (9) the amendment of Penal Code section 209 entitles

defendants to consideration for parole We discuss each contention in turn after recitation of the facts.

We find that the trial court erred in denying the defendants' motions for a substitution of counsel without making an inquiry into their reasons, but we hold that the error was not prejudicial to defendants. We reject defendants' contentions that the court erred in denying the motion for a change of venue, that they cannot be convicted of kidnapping for the purposes of robbery, that the evidence does not support the convictions for robbery of Eanswythe Leicester, and that the trial court committed prejudicial error in its jury instructions on assault with a deadly weapon. We agree that the judgments must be modified due to the imposition of multiple punishment and that there must be a limited reversal of the multiple findings of the use of a firearm. Defendants will be entitled to consideration for parole due to the amendment of Penal Code section 209. Finally, we note that defendants are entitled to credit for time spent in jail pending conviction

for these offenses. The abstracts of judgment must be modified to reflect this time.

*****

The contentions on appeal necessitate a detailed review of the incidents leading to the crimes.

On the evening of May 20, 1976, at approximately 9:00 p.m., college students Eanswythe Leicester, Jeremy Grainger, James McCabe and Laura Goldman were in the vicinity of Redding, California, on a camping trip. The students stopped at campsite 14 of the Antlers Campground to eat and go swimming. On their way to the lake the students met defendant Caswell and spoke with him briefly. After finding that they could not reach the lake from their campsite, the students crossed campsite 16 on their way back to the car, and there talked with both defendants who were occupying that campsite.

The students then returned to their car and left the campsite, and as they passed campsite 16 defendants came out to the road and waved for them to

stop. Defendants asked for a ride out of the campground, then defendant Englund pointed a gun at the students and ordered them out of the car. The students were ordered to the campsite 16 picnic benches as Englund pointed the gun at them and Caswell pushed them along, saying that Englund had "a hole in his leg." Caswell drove the car into the campsite.

Defendants demanded money from the students; Jeremy and Laura gave their money to defendants and James went to the car with Caswell and gave his money to him. Eanswythe had left her money in her backpack in the car and she told defendants she did not have money. When defendants wanted more money Jeremy told them they were students and did not have much. Englund struck him with the gun. Defendants indicated that they were going to take the car, and again stated that Englund was wounded.

Defendants attempted to tie the students at the picnic bench, but then took them through the bushes to a meadow where they were forced to lie on the

ground. Defendants decided that the students were too close to the road and might be able to shout for help, so they ordered them to get up and took them farther from the road. One of the defendants stated that Jeremy's political T-shirt would make a good target. The gun was fired, but no one was shot at that time.

The victims were taken to a cliff and ordered to undress. Eanswythe was then tied by the ankles with Jeremy's T-shirt, and Laura and Jeremy were tied together with rope defendants had brought along. Defendants tied Eanswythe's ankles to Laura and Jeremy using the same rope that Laura and Jeremy were tied with. While tying the victims, Caswell indicated that he wanted to take sexual advantage of one of the girls, but Englund was in a hurry and the matter was dropped. When the victims were tied the defendants debated whether to shoot them, Englund arguing that they should and Caswell saying they should not.

After tying three of the victims defendants ran out of rope, and so they tied James' legs with some

clothing. Englund struck James with the gun and Caswell pushed him off the cliff. Defendants shot at James and rolled rocks down at him until they believed he was dead. Caswell attempted to push the others off the cliff but failed, due to the manner in which they had been bound. The following discussion then took place: Englund: "Okay, let's just gag them." Caswell: "Shoot them." Englund: "Okay." Englund then shot Laura in the stomach and Jeremy in the chest. Eanswythe realized that it was her turn, and she held her hand in front of her face to prevent her glass lens from shattering into her eyes. She was struck with the gun four or six times, and two shots were fired at her, one passing by her ear and the other striking her finger. She then fell backwards.

Defendants ran back to the car and drove off. Jeremy and Eanswythe were conscious at the time and they called for help. James heard their calls, climbed back up the cliff and ran for help. James met

a volunteer rescue team that was meeting in the area and the victims were rescued.

Eanswythe suffered three lacerations to her scalp and bled extensively, losing about three pints of blood. She also suffered a gunshot wound on her left hand. Jeremy suffered lacerations about the head and he had a gunshot would near the left nipple on his chest. The bullet had struck the pericardium (the sac about the heart), was deflected and struck the breast bone breaking the inner surface, traveled through the liver, turned and passed through the liver again, and finally lodged in the abdominal wall. Laura suffered rope burns on her neck, bruises on her shoulder, chest and abdomen. She also had a gunshot would in the abdomen which caused massive bleeding when it severed an artery. James suffered lacerations which required stitches.

The victims where shown two photographic line-ups with six pictures each. Eanswythe easily identified Englund as the gunman, and identified Caswell with less assurance. Jeremy positively identified Englund,

and identified Caswell but was less sure of that identification. Laura had no doubt in her identification of Englund as the gunman, and only a slight doubt as to her identification of Caswell. At a physical line-up Jeremy identified both defendants.

Defendants had changed their appearance drastically by the time of trial. Nevertheless, Jeremy identified them as the assailants, and stated that Englund was the gunman. Laura also identified Englund as the gunman, and identified Caswell. Eanswythe had no doubt that defendants were the assailants. James could not identify defendants at trial, but indicated that Englund appeared similar to one of the assailants. At the preliminary hearing James had identified defendants, but stated that they no longer looked the same.

Two of the victims testified that they had heard the gunman refer to the other assailant as "Steven", which is Caswell's first name. The victims also testified that they had observed a bottle of Black and

White scotch at the assailant's campsite during the incident.

On May 20, 1976, Ron Ball and a friend were in the Redding area. They picked up two hitchhickers named Dave and Steve, whom Ron identified as the defendants, and went to campsite 16 of the Antlers Campground where the hitchhikers were camped. The group brought two six-packs of Mickey's Big Mouth beer and then went swimming. While swimming Caswell wore a pair of maroon cutoffs, and Ron noticed that Englund had a tatoo on his shoulder that said "Dave." After swimming the group had a drink from a bottle of Black and White scotch which defendants had in their camp. Ron and his friend left about 7:30 p.m., stating that they might return later. They returned about 9:45 p.m., and observed the rescue efforts.

In the late evening hours of May 20, 1976, Chester Sharp, who owns a ranch two miles south of Grenada and just east of Highway 99, was irrigating his

crops. At that time he observed three police vehicles with lights flashing and sounding sirens pursuing another vehicle. The first car paused near his property but did not stop, then drove on. On May 28, 1976, Chester was again irrigating his crops near the area where he had observed the car pause, when he stepped on a hard object which proved to be a pistol.

Guido Mei, a resident of Dunsmuir, testified that on May 19, 1976, his home had been burglarized. A .22 caliber pistol, a turquoise ring and necklace, and some Black and White scotch had been taken. He identified the pistol found by Chester Sharp as his pistol, and noted that the serial number matched his pistol. He further identified a necklace Englund was wearing when arrested as the necklace that had been taken from his home. Joan Dungan, who had made the necklace, identified Englund's necklace as the one she had sold to Guido. Ron Ball testified that while swimming with defendants, Englund had lost a ring.

On May 20, 1976, at about 10:45 p.m., Officer Riley of the Weed police force observed James McCabe's Pinto with two occupants driving northbound on Interstate 5. He had been previously alerted to be on the lookout for that particular vehicle, so he followed the car down the offramp to old Highway 99. When the backup units he had called arrived he flashed his lights for the Pinto to Stop and a high speed chase ensued. A roadblock was set up ahead of the chase, and when the driver observed this he drove the Pinto off the road and the suspects fled. Deputy Schaffer of the Shasta County sheriff's Office recovered several items from the Pinto, including a pair of damp maroon cutoffs.

On May 21, 1976, Deputy Francis Cena, of the Siskiyou County Sheriff's Office,joined other law enforcement personnel near Yreka in a search for the suspects. One of the Yreka officers called out on a public address system for "a Steve and a Dave" to come down from the mountain. The suspects then gave themselves up to Deputy Cena. Cena identified the

defendants as the suspects but noted that their appearance had changed since the incident.

When defendants were booked Englund was observed to have "Dave" tatooed on his shoulder. The booking officer testified that defendants had greatly changed their appearance since the time of the booking. When Englund was being booked he was observed to have two puncture wounds on his thigh and a wounded toe on the same leg. Dr. Edward Macomber treated the wounds and testified that they were consistent with a gunshot wound. Metal fragments consistent with lead were found in the toe wound.

Hair fragments and blood were found to be embedded on the pistol recovered by Chester Sharp. Human blood was found on Caswell's jacket as well as other clothing belonging to him. Defendants were placed at the campsite by fingerprints found on bottles left there. One of Caswell's fingerprints was found on the driver's side of McCabe's Pinto.

I

The trial court's denial of defense motions for a substitution of counsel without a hearing is reversible error, argue the defendants.[1] In considering this contention a brief chronological outline is necessary: On June 14, 1976, when defendants appeared for arraignment, Public Defender Joseph Redmon was appointed to defend Englund, and due to a possible conflict of interest Terence Pierson was appointed as

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1. The Attorney General notes that the defense

[Fn. 1. con't. on p. 16]

motions sought the replacement of the public defender and substitution of a "state bought street attorney." Since defendant Caswell was represented by an appointed private attorney due to the possible conflict of interest of the public defender, respondent asserts that the motion did not apply to Caswell and that Caswell's contention should be rejected for this reason. We reject this contention. Caswell submitted and signed the motions for substitution of attorneys and asserted that his counsel was not representing him due to his failure to visit defendant in the jail. We note further that Caswell's attorney was listed as "sub. public defender" on the official documents. Caswell's motions can only be construed as a motion to replace the attorney that was representing him, and thus we consider his contention that the court erred in refusing the relief without a hearing.

substitute public defender to represent Caswell. On August 13, 1976, after the denial of defendant's motion for a change of venue, defendants filed separate petitions for writs of habeas corpus on the grounds that the motion for a change of venue was improperly denied. On the standard form used by the defendants, where the defendant is to state whether he is represented by an attorney, each defendant stated: "Yes court appointed Public Defendant, want state bought street atty." The petitions were denied.

Defendants jointly prepared a motion to dismiss the public defender and to have new counsel appointed, dated August 6, 1976. Defendant's reasons for their motion were the failure of the public defender to investigate or talk with defendants, the "inactive, silent, careless and reckless abandon" of the public defender to visit defendants at the jail, and the inability of defendants to find "solace and assuredness" in confiding or depending on the public defender. The motion was denied by Judge Abbe in a minute order dated

August 16, 1976. The motion and the minute order were filed on August 17, 1976.

On August 18, 1976, Caswell filed a declaration for the peremptory disqualification of Judge Richard B. Eaton under Code of Civil Procedure section 170.6.

On August 23, 1976, Englund filed a "request for a copy of proceedings" dated August 19, 1976. Englund's stated reasons for this request was that Public Defender Redmon lacked time and interest to make a proper defense. Judge Eaton denied this request in a minute order dated August 20, 1976, Englund submitted a petition for the dismissal of the Public Defender's Office. He stated that Public Defender Redmon was too busy and had not "made a case" in defense of Englund. Judge Eaton again denied this request in a minute order on September 1, 1976, and the petition and the order was filed on September 7, 1976.

A review of the above proceedings disposes of Englund's contention that Judge Eaton's orders were null and void because he had been disqualified under Code of Civil Procedure section 170.6. Englund did not file a declaration to disqualify Judge Eaton, only Caswell did so. Caswell did not join in the motions after he filed his declaration. Judge Eaton was not disqualified to act on the motions.

It is a matter of judicial discretion whether to substitute court-appointed counsel in the absence of a sufficient showing that a defendant's right to counsel would otherwise be substantially impaired. (People v. Walker (1976) 18 Cal.3d 232, 238.) Defendants alleged that the public defender did not visit them, investigate or prepare an adequate defense. Although defendants' disagreement as to tactics and strategy is not sufficient reason to require a substitution of counsel (ibid.; People v. Stewart (1970) 6 Cal.App.3d 457, 464-465), the failure to investigate or prepare a defense on the part of the appointed counsel would be cause for a substitution.

(People v. Groce (9171) 18 Cal.App.3d 292, 296-297.) The appointed counsel made at least six appearances before the court on behalf of defendants, and prepared and argued a motion for change of venue. The court was also aware that the public defender had hired a private investigator to work on the case. In addition, the court may have been aware of the appointed counsels' competence through prior appearances before the court. No reasons, however, were given by the trial court for the denial of the motions. Defendants were not allowed the opportunity to point to specific facts in support of their motion or to make argument to the court. The record does not show that the trial court made a further inquiry into the matter after defendants made their motion. When defendants have raised an issue that would support the substitution of counsel if the claims of defendants are true, it is error for the trial court to deny the motion without further inquiry. (People v. Marsden (1970) 2 Cal.3d 118, 124, People v. Munoz (1974) 41 Cal.App.3d 62, 66.)

We must consider whether the trial court's error in this case was prejudicial to the defendants. We find beyond a reasonable doubt that the error did not contribute to defendants' convictions. (People v. Marsden, supra, 2 Cal.3d at p. 126; see also Chapman v. California (1967) 386 U.S. 18 [17 L.Ed.2d 705].) Trial counsel appeared several times before the trial court prior to trial. They prepared, filed and argued a motion for the change of venue with numerous supporting papers. Counsel employed a private investigator to assist in preparation of the defense. Counsel participated actively at the trial and the record is replete with evidence of counsels' preparation and knowledge of both the legal and factual issues involved. Many of the issues on appeal discussed below are the result of counsels' care in making a record to support the consideration of the issues. Defendants were competently represented at trial. The evidence was overwhelming against them. They were identified by the victims. They were placed at the site of the crime shortly before the crime by an

eyewitness. Circumstantial evidence linked defendants to the crime. The trial court's error was not prejudicial and does not require reversal of the convictions.

II

Did the trial court err in denying defendants' motion for change of venue? In reviewing the trial court's determination to deny a change of venue, in a petition for a writ to mandate, it is the duty of the reviewing court to make an independent evaluation of the circumstances and to satisfy itself de novo that defendant obtains a fair and impartial trial. (Maine v. Superior Court (1968) 68 Cal.2d 375, 382; Corona v. Superior Court (1972) 24 Cal.App.3d 872, 875.) The same standard applies on appeal after a conviction. (People v. Manson (1976) 61 Cal.App.3d 102, 184.) A motion for a change of venue should be granted where there is a reasonable likelihood that, in the absence of such relief, defendants cannot have a fair trial. (Frazier v. Superior Court (1971) 5 Cal.3d 287, 294-295; Maine v. Superior court, supra, 68 Cal.2d at 383-384.) Among the

factors to be considered are the size of the community, the nature of the crime, the extent and effect of pretrial publicity, and political factors involved in trying the case. (Maine v. Superior Court, supra, at 385-388.)

The crimes involved were committed on May 20, 1976. There was front page newspaper coverage and radio coverage of the event following the incident, and following the arrest of the defendants on May 22, 1976. Defendants' first appearance in court was also covered on the front page. Defendants only submitted three other articles covering the incident, the latest an article of June 15, 1976, none of which were front page articles. The accounts of the incident reported a brief summary of the facts of the crimes, the condition of the victims, and identified the defendants as suspects. The articles did not report the evidence against defendants and were not inflammatory towards defendants.

The trial began on October 5, 1976, more than four months after the commission of the crime and

the arrest of defendants, and nearly four months since the last publicity on the incident. During the selection of the jury the prospective jurors were questioned whether they recalled hearing about a shooting incident at the Antlers Campground. Of the 68 questioned, 46 recalled hearing about the incident but only 6 had more than a vague recollection of reading about a shooting incident. One prospective juror paid particular attention because he was familiar with the campground, one had a daughter who attended school with one of the victims and had learned of the incident in that way, and one worked in the probation office and had heard of the incident from police officers. Only 3 of 68 prospective jurors questioned had any specific recollection for the publicity. Of the 12 jurors selected to be on the jury, 7 recalled hearing about an incident at Antlers Campground, but none had any specific recollection.

Shasta County is a moderately small county, and the crime was a heinous one, factors which indicate that a change of venue may be appropriate. However,

both the defendants and the victims were nonresidents, and there was no showing of an outpouring of sympathy for the victims or abhorrence towards the defendants. The publicity surrounding the incident was neither voluminous nor inflammatory, and occurred substantially prior to the trial. Defendants also point to the fact that District Attorney Baker had campaigned for the superior court judgeship, and Public Defender Redmon had campaigned for a position as justice court judge. The primary election was held on June 8, 1976, however, and there is no showing that either party was campaigning after that date. District Attorney Baker did not take a personal part in the trial. These factors taken together, do not establish that there was a reasonable likelihood that defendants could not have a fair and impartial trial absent a change of venue. We hold that the court did not err in denying the motion.

III

Defendants contend as a matter of law they are not guilty of kidnapping for the purposes of

robbery. (Pen. Code § 209.) They argue that the victims were not moved a substantial distance, and that the movement did not substantially increase the victims' risk of harm.

Insubstantial movement which is merely incidental to the crime of robbery and which does not substantially increase the risk of harm to the victims otherwise present is insufficient to constitute a violation of Penal Code section 209. (People v. Daniels (1969) 71 Cal.2d 1119, 1140.) However, the fact that in each case a defendant chooses to consummate the robbery at a location remote from the place of initial contact does not render the subsequent asportation "merely incidental" to the crime. It is the very fact that defendant utilized substantial asportation in the commission of the crime which renders him liable to the increased penalty of Penal Code section 209, if that asportation was such that the victim's risk of harm was substantially increased thereby. (People v. Thornton 91975) 11 Cal.3d 738, 768.) The distance of the asportation is not subject to any hard

and fast rule, but must be such as is considered substantial. (People v. Daniels, supra, 71 Cal.2d. at 1128.) The movement must increase the risk of harm over and above that necessarily present in the robbery itself. (Id., at 1139-1140.) A careful reading of the Supreme Court's opinion in Daniels discloses that the underlying purpose of its holding was to distinguish between true kidnapping situations and crimes which are essentially robbery, rape or assault and in which some confinement or asportation occurs as a subsidiary incident. (Id., at 1130-1139.)

During the perpetration of the offenses the victims were taken from the road to the defendants' campsite, from there to a meadow, and finally to a cliff. The movement was through a wilderness area. There was conflicting evidence as to the distance the victims traveled. Jeremy estimated the distance from the meadow to the cliff to be 200 yards. Defendants presented evidence that the shortest distance from the cliff to the road was 265 feet. In their briefs defendants

use 355 feet as the distance from the campground to the cliff. The issue is not one of specific distance, but is whether that distance can be considered substantial. The fact that the asportation was in an unpopulated area through wilderness terrain supports the finding that the asportation was substantial. Further, the movement was over and above any that could be considered necessary or "merely incidental" to the crime of robbery.

Importantly, there can be no doubt that the asportation substantially increased the risk of harm of the victims. The specific purpose in the movement was so the victims could no call out for help. There was medical testimony that Eanswythe had lost 3 pints of blood, Jeremy was severely wounded, and Laura had 2 quarts of blood in her abdomen from her wound and would have died had she not received immediate medical attention. While merely moving the victim to a place obscured from public view does not in itself substantially increase the risk of harm (People v. Crumpton (1973) 9 Cal.3d 463, 467), the movement at gunpoint of the

victims to a spot of isolation where they were not likely to be discovered and where they were left tied and wounded without clothing, did substantially increase the risk of harm to the victims. Defendants cannot avoid the consequences of their act merely because they failed sufficiently to incapacitate one of their victims so that he was able to get help for the other victims.

Defendants urge us to reconsider the Supreme Court's opinions to People v. Thornton, supra, 11 Cal.3d 738, and In re Earley (1975) 14 Cal.3d 122. As an intermediate appellate court we are bound by the opinions of the Supreme Court. (Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455.) Furthermore, we are satisfied that the facts established at trial support the verdict under the Daniels criteria. The movement was substantial and substantially increased the risk of harm to the victims. It was not merely incidental to the robbery. The evidence supports the verdicts.

IV

As to Eanswythe Leicester, the defendants contend that the evidence is insufficient to establish the crime of robbery. They reason that Eanswythe testified that when defendant demanded money from the victims, she had left her money in the car and thus did not give anything to the defendants.

Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, against his will, accomplished with force or fear. (Pen. Code, § 211.) An intent to steal, i.e., an intent to deprive an owner permanently of his property, is an essentially element of robbery. (People v. Butler (1967) 65 Cal.2d 569, 573; People v. Ford (1964) 60 Cal.2d 772, 793.) An intent to steal may ordinarily be inferred when one person takes the property of another, particularly if he takes it by force. (People v. Butler, supra, 65 Cal.2d at 573.)

Defendants forced Eanswythe from the car at gunpoint and announced that they were taking the car.

Defendants were aware that Eanswythe's possessions were in the car, and the jury could have determined that defendants intended to take the possessions in the car as well as the car. There was substantial evidence by which the jury could have found defendants guilty of robbery of Eanswythe Leicester.

V

The convictions for felonious assault, defendants insist, must be reversed for failure to instruct the jury on general criminal intent. (See CALJIC No. 3.30.)

Felonious assault requires the general intent willfully to commit an act the direct, natural and probable consequences of which, if successfully completed would be injury to another. (People v. Rocha (1971) 3 Cal.3d 893, 899. See also, People v. Hood (1969) 1 Cal.3d 444, 457-458.) The California Supreme Court in Rocha, supra, specifically approved instructions which were given in this case (CALJIC Nos. 9.03, 604

(2d rev.ed. 1958) which specify "with criminal intent" as an element of the crime. (3 Cal.3d at 899.)

We are cited to no case and we find none which requires the trial court to instruct on general criminal intent, sua sponte, in the circumstances of this case. The jury was instructed that assault requires criminal intent, and it is inconceivable on the evidence presented against defendants that a different result would have been reached by the jury if CALJIC No. 3.30 had been given. We find no reversible error.

VI

Defendants contend that their sentences may not be enhanced due to the use of a firearm under Penal Code section 12022.5. Respondent so concedes. We agree.

Trial took place in October 1976. On November 1, 1976, when defendants appeared for sentencing, the Supreme Court's opinion in People v. Walker, supra, 18 Cal.3d 232, had been issued but had not yet appeared in the advance sheets of the reporters.

The trial court rejected Caswell's motion to strike the allegations, and imposed 16 findings of firearm use against each defendant.

The trial court instructed the jury that a person may be guilty of the use of a firearm if he willfully participates in a crime knowing that a firearm is being used by another and if he benefits from that use, even if he does not personally hold or possess the firearm. The California Supreme Court rejected that theory in People v. Walker, supra; only a person who personally uses a firearm is subject to the enhanced penalties. It was thus error for the trial Court to give the above instructions.

The evidence at the trial was overwhelming in establishing that Englund personally used the pistol. The victims identified Englund as the gunman, and he had the "hole in his leg" that the gunman was said to have had. The evidence failed to indicate that Caswell at any time personally used the firearm. Nonetheless, Englund, as well as Caswell, was denied the right to a

jury trial on the question of whether he had personally used the firearm. The jury was not required by the instructions to determine whether either defendant or both actually used the firearm.

We note that the sentence for conviction under Penal Code section 209 is life imprisonment. The enhancement provisions of Penal Code section 12022.5 can be given no effect in the case of a defendant sentenced to life imprisonment upon conviction of the basic crime in the perpetration of which he uses a firearm. (People v. Walker, supra, 18 Cal.3d at 244.)

That part of the judgment which enhances the sentences due to the use of a firearm is reversed. The cause must be remanded to the trial court with a direction to re-sentence defendants after a limited new trial on the issue of firearm use. (See People v. Fisk (1975) 50 Cal.App.3d 364.)

VII

Defendants contend and respondent concedes that Penal Code section 654 bars the imposition

of sentence for all of the convictions and permits only punishment for the greatest offense as to each victim. We agree.

When a defendant commits multiple violations incident to a single objective, conviction is proper for each violation but defendant may not be punished for more than one violation. (People v. Miller (1977) 18 Cal.3d 873, 885.) Defendants may be punished for multiple violations when during the course of conduct they commit crimes of violence against multiple victims (Ibid.) The evidence herein reveals a single course of conduct with one objective and four victims. Defendants may be punished for the most serious offence against each victim, that being the violation of Penal Code section 209. Conviction for the other offenses is appropriate, but the execution of sentence must be stayed pending the service of sentence for the violations of Penal Code section 209, such stay to become permanent upon the completion of service of sentence

for the violations of Penal Code section 209. (Id., at 886.)

VIII

Defendants contend that a sentence of life imprisonment without possibility of parole (see Pen. Code, § 209), is cruel and unusual punishment in violation of the United States and California Constitutions. Defendants note this court's previous rejection of similar contentions (People v. Isitt (1976) 55 Cal.App.3d 23, 31; In re Maston (1973) 33 Cal.App.3d 559, 565), but urge reconsideration in light of the recent amendment to Penal code section 209.

The Uniform Determinate Sentencing Act of 1976, effective July 1, 1977, has amended Penal Code section 209 to provide for the possibility of parole for persons convicted of kidnapping to commit robbery regardless of whether bodily harm has been suffered by the victim. (See Stats. 1976, ch. 1139.) The act further provides for the retroactive application of the provisions of the Act by the Community Release Board. (Pen.

Code, § 1170.2, amended by Stats. 1977, ch. 165.) The Legislature clearly has the power to provide for application of Penal Code amendments decreasing punishment to judgments not yet final at the effective date of the amendment. (See In re Estrada (1965) 63 Cal.2d 740, 744.) As defendants will be eligible for parole in accordance with legislative directive to the Community Release Board, we need not again consider the contention that life without possibility of parole is cruel and unusual punishment.

IX

We finally note that the trial court did not make a finding as to time in custody attributable to the offenses involved. Defendants are entitled to have such time applied to their sentences (Pen. Code, § 2900.5; In re Kapperman (1974) 11 Cal.3d 542, 550), and the trial court must modify the abstracts of judgment to specify such time.

CONCLUSION

We have found error in the trial court's denial of the defendants' motions for a substitution of counsel, without inquiry, but we hold that the error was not prejudicial to the defendants. We have found no error in the denial of defendants' motion for a change of venue. We reject defendants' contentions that the evidence does not support the verdicts of kidnapping for the purposes of robbery, or of robbery of Eanswythe Leicester. We find no prejudicial error in the jury instructions on assault with a deadly weapon.

We hold that the findings of the use of a firearm must be reversed and the cause remanded for limited new trial upon that issue.

The execution of sentence for convictions of robbery, attempted murder and felonious assault against each victim must be stayed for each defendant, pending service of sentence for the convictions of violation of Penal Code section 209 against each victim,

such stays to become permanent upon completion for sentence for the violations of Penal Code section 209.

Defendants will be entitled to parole under the amendments to Penal Code section 209. We do not consider whether the sentence of life without possibility of parole under former Penal Code section 209 violates the Constitutions of the United States or California. Finally, we hold that the abstracts of judgment must be modified to reflect the time defendants spent in custody attributable to the above offenses prior to their delivery to the Department of Corrections.

The judgments of conviction are modified to stay the services of sentence of each of the convictions for first degree robbery, felonious assault, and attempted murder, such stays to become permanent upon completion of service of sentence of the convictions for kidnapping for the purpose of robbery. That part of the judgment which enhances the sentence due to the use of firearm is reversed. The cause is remanded to the trial court with a direction to re-sentence defendants after a

limited new trial on the issue of firearm use. The superior court is directed to prepare and furnish the Director of Corrections with a certified copy of amended abstracts of judgment reflecting the above modifications and reflecting custodial time for which the defendants are to receive credit upon their prison sentences.

The judgments as modified are reversed as to the enhancement of sentence due to the use of a firearm. Otherwise, they are affirmed.

/S/

We concur:

/S/

/S/

APPENDIX I

UNITED STATES CONSTITUTION

FIFTH AMENDMENT

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

SIXTH AMENDMENT

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

FOURTEENTH AMENDMENT

"Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX J

CALIFORNIA PENAL CODE

SECTION 31

"**Who are principals.** All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, and all persons counseling, advising, or encouraging children under the age of fourteen years, lunatics or idiots, to commit any crime, or who, by fraud, contrivance, or force, occasion the drunkenness of another for the purpose of causing him to commit any crime, or who, by threats, menaces, command, or coercion, compel another to commit any crime, are principals in any crime so committed." [Enacted 1872.]

SECTION 187

"**Murder defined.** (a) Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.

"(b) This section shall not apply to any person who commits an act which results in the death of a fetus if any of the following apply:

"(1) The act compiled with the Therapeutic Abortion Act, Chapter 11 (commencing with Section 25950) of Division 20 of the Health and Safety Code.

"(2) The act was committed by a holder of a physician's and surgeon's certificate, as defined in the Business and Professions Code, in a case where, to a medical certainty, the result of childbirth would be death of the mother of the fetus or where her death from childbirth, although not medically certain, would be substantially certain or more likely than not.

"(3) The act was solicited, aided, abetted, or consented to by the mother of the fetus.

"(c) Subdivision (b) shall not be construed to prohibit the prosecution of any person under any other provision of law." [As amended by Stats. 1970, ch. 1311, § 1.]

"(a) Every person who forcibly, or by any other means of instilling fear, steals or takes, or holds, detains, or arrests any person in this state, and carries the person into another country, state, or county, or into another part of the same county, is guilty of kidnapping.

"(b) Every person, who for the purpose of committing any act defined in Section 288, hires, persuades, entices, decoys, or seduces by false promises, misrepresentations, or the like, any child under the age of 14 years to go out of this country, state, or county, or into another part of the same county, is guilty of kidnapping.

"(c) Every person who forcibly, or by any other means of instilling fear, takes or holds, detains, or arrests any person, with a design to take the person out of this state, without having established a claim, according to the laws of the United States, or of this state, or who hires, persuades, entices, decoys, or seduces by false promises, misrepresentations, or the like, any person to go out of this state, or to be taken or removed therefrom, for the purpose and with the intent to sell that person into slavery or involuntary servitude, or otherwise to employ that person for his or her own use, or to the use of another, without the free will and consent of that persuaded person, is guilty of kidnapping.

"(d) Every person who, being out of this state, abducts or takes by force or fraud any person contrary to the law of the place where that act is committed, and brings, sends, or conveys that person within the limits of this state, and is afterwards found within the limits thereof, is guilty of kidnapping.

"(e) Subdivisions (a) to (d), inclusive, do not apply to any of the following:

(1) To any person who steals, takes, entices away, details, conceals, or harbors any

child under the age of 14 years, if that act is taken to protect the child from danger of imminent harm.

(2) To any person acting under Section 834 or 837." [Amended by Stats. 1990, c. 55, (S.B. 1564), § 1.]

SECTION 209

"(a) Any person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away another person by any means whatsoever with intent to hold or detain, or who holds or detains, that person for ransom, reward or to commit extortion or to exact from another person any money or valuable thing, or any person who aids or abets any such act, is guilty of a felony, and upon conviction thereof, shall be punished by imprisonment in the state prison for life without possibility of parole in cases in which any person subjected to any such act suffers death or bodily harm, or is intentionally confined in a manner which exposes such person to a substantial likelihood of death, or shall be punished by imprisonment in the state prison for life with the possibility of parole in cases where no such person suffers death or bodily harm.

"(b) Any person who kidnaps or carries away any individual to commit robbery shall be punished by imprisonment in the state prison for life with possibility of parole.

"(c) In all cases in which probation is granted, the court shall, except in unusual cases where the interests of justice would best be served by a lesser penalty, require as a condition of the probation that the person be confined in the county jail for 12 months. If the court grants probation without requiring the defendant to be confined in the county jail for 12 months, it shall specify its reason or reasons

for imposing a lesser penalty." [Amended by Stats. 1990, c. 55 (S.B. 1564), § 3.]

SECTION 211

"**Robbery defined.** Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear."
[Enacted 1872]

SECTION 245

"(a) (1) Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars ($10,000), or by both the fine and imprisonment.

(2) Any person who commits an assault upon the person of another with a firearm shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not less than six months and not exceeding one year, or by both a fine not exceeding ten thousand dollars ($10,000) and imprisonment.

(3) Any person who commits an assault upon the person of another with a machinegun, as defined in Section 12200, or an assault weapon, as defined in Section 12276, shall be punished by imprisonment in the state prison for 4, 8, or 12 years.

"(b) Any person who commits an assault upon the person of another with a semiautomatic firearm shall be punished by

imprisonment in the state prison for three, six, or nine years.

"(c) Any person who commits an assault with a deadly weapon or instrument, other than a firearm, or by any means likely to produce great bodily injury upon the person of a peace officer or firefighter, and who knows or reasonably should know that the victim is a peace officer or firefighter engaged in the performance of his or her duties, when the peace officer or firefighter is engaged in the performance of his or her duties, shall be punished by imprisonment in the state prison for three, four, or five years.

"(d) (1) Any person who commits an assault with a firearm upon the person of a peace officer or firefighter, and who knows or reasonably should know that the victim is a peace officer or firefighter engaged in the performance of his or her duties, when the peace officer or firefighter is engaged in the performance of his or her duties, shall be punished by imprisonment in the state prison for four, six, or eight years.

(2) Any person who commits an assault upon the person of a peace officer or firefighter with a semiautomatic firearm and who knows or reasonably should know that the victim is a peace officer or firefighter engaged in the performance of his or her duties, when the peace officer or firefighter is engaged in the performance of his or her duties, shall be punished by imprisonment in the state prison for five, seven, or nine years.

(3) Any person who commits an assault with a machinegun, as defined in Section 12200, or an assault weapon, as defined in Section 12276, upon the person of a peace officer or firefighter, and who knows or reasonably should know that the victim is a peace officer or firefighter engaged in the performance of his or her duties, shall be

punished by imprisonment in the state prison for 6, 9, or 12 years.

"(e) When a person is convicted of a violation of this section in a case involving use of a deadly weapon or instrument or firearm, and the weapon or instrument or firearm is owned by that person, the court shall order that the weapon or instrument or firearm be deemed a nuisance, and it shall be confiscated and disposed of in the manner provided by Section 12028.

"(f) As used in this section, 'peace officer' refers to any person designated as a pace officer in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2." [Amended by Stats. 1989, c. 18, § 1; Stats. 1989, c. 1167, § 1; Stats. 1993, c. 369 (A.B. 1344), § 1.]

SECTION 666

"Every person who, having been convicted of petit theft, grand theft, auto theft under Section 10851 of the Vehicle Code, burglary, carjacking, robbery, or a felony violation of Section 496 and having served a term therefor in any penal institution or having been imprisoned therein as a condition of probation for that offense, is subsequently convicted of petit theft, then the person convicted of that subsequent offense is punishable by imprisonment in the county jail not exceeding one year, or in the state prison." [Amended by Stats. 1988, c. 831, § 1; Stats. 1993, c. 610 (A.B. 6), § 9.5, eff. Oct. 1, 1993; Stats. 1993, c. 611 (S.B. 60), § 10, eff. Oct. 1, 1993.]

APPENDIX K

PLAINTIFF'S PROPOSED INSTRUCTION NO. 31

All persons concerned in the commission of a crime who either directly and actively commit the act constituting the offense or who with knowledge of the unlawful purpose of the perpetrator of the crime aid and abet in its commission or, whether present or not, who advise and encourage its commission, are regarded by the law as principals in the crime thus committed and are equally guilty thereof.

One who aids and abets is not only guilty as a principal of the particular crime that to his knowledge his confederates are contemplating committing, but he is also liable as a principal for the natural and reasonable or probable consequences of any act that he knowingly aided or encouraged.

AUTHORITY: CALJIC 3.00 (1976 Revision)

GIVEN:

REFUSED:

MODIFIED:

/s/
PRESIDING JUDGE

PLAINTIFF'S PROPOSED INSTRUCTION NO. 32

A person aids and abets the commission of a crime if, with knowledge of the unlawful purpose of the perpetrator of the crime, he aids, promotes, encourages or instigates by act or advice the commission of the crime.

AUTHORITY: CALJIC 3.01 (1974 Revision)

GIVEN:

REFUSED:

MODIFIED:

/s/

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PRESIDING JUDGE

PLAINTIFF'S PROPOSED INSTRUCTION NO. 25

In the crimes of Robbery, Kidnaping to Commit Robbery and Attempted Murder of which the defendant is charged in the information, a necessary element is the existence in the mind of the defendant of the specific intent as to each of said offenses as I have heretofore instructed you.

If the evidence shows that a defendant was intoxicated at the time of the alleged offense, the jury should consider his state of intoxication in determining if defendant had such specific intent.

If from all the evidence you have a reasonable doubt whether defendant was capable of forming such specific intent, you must give the defendant the benefit of that doubt and find that he did not have such specific intent.

AUTHORITY: CALJIC 4.21

GIVEN:

REFUSED:

MODIFIED:

/s/

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PRESIDING JUDGE

PLAINTIFF'S PROPOSED INSTRUCTION NO. 12

Any person who, with the specific intent to commit robbery, kidnaps any individual, is guilty of the crime of kidnaping to commit robbery.

The specific intent to commit robbery must be present when the kidnaping commences.

Robbery is the taking of personal property of any value in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear and with the specific intent permanently to deprive the owner of his property.

Kidnaping is the unlawful movement by physical force of a person against his will and without his consent for a substantial distance where such movement is not merely incidental to the commission of the robbery and where such movement substantially increases the risk of significant physical injuries to such person over and above those to which such person is normally exposed in the commission of the crime of robbery itself.

Kidnaping is the unlawful compulsion of another person against his will and without his consent and because of a reasonable apprehension of harm, to move for a substantial distance where such movement is not merely incidental to the commission of the robbery and where such movement substantially increases the risk of significant physical injuries to such person over and above those to which such person is normally exposed in the commission of the crime of robbery itself.

If you should find a defendant guilty of the charge against him under Counts II, VI, X, and XIV, you must also find whether or not the person kidnaped suffered bodily harm in connection with or as a result of the commission of the crime and state your decision in that respect in your verdict.

The person kidnaped may be found to have suffered bodily harm only if the proof shows beyond a reasonable doubt that he did suffer bodily harm.

"Bodily harm," as that term is used in this instruction, means substantial injury to the body of a person who was kidnaped by the application of physical force above

and in addition to the force which is necessarily involved in the commission of such kidnaping.

AUTHORITY: CALJIC 9.23, (1973 Revision)

GIVEN:

REFUSED:

MODIFIED:

/s/

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PRESIDING JUDGE